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Supreme Court

of the

United States

OCTOBER TERM, 1905

No. 235.

SANTA FE PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

LAURETE HOLMES,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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vs.

LAURETE HOLMES, Defendant in Error.

Error to the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Defendant in error presents as his statement of facts herein, the statement of facts taken from the

brief of plaintiff in error in the Circuit Court of Appeals, and refers to the statement of facts made by the Circuit Court of Appeals in connection with its opinion herein. (Transcript of Record, p. 111):

"This is an action brought to recover damages for personal injuries sustained by defendant in error while in the employ of plaintiff in error as a locomotive engineer and by reason of a head-on collision between a limited passenger train westbound and known as Train No. 3 and a train of similar character eastbound and known as Train No. 4, and on which defendant in error was on duty as engineer, occurring at a point about one mile west of Franconia Station on the Arizona Division of the Santa Fe Pacific Railroad—a link in the transcontinenetal line of railroad known as the Santa Fe System.

"Defendant in error claims that this collision and his injuries were caused in part by negligence on the part of the train dispatcher in failing to prevent the violation of orders hereinafter mentioned, by the crew in charge of Train No. 3, by reason of which this collision resulted.

"Plaintiff in error had a train dispatching office at Needles, the jurisdiction of which included the division of its railroad extending eastward from Needles to Seligman, Arizona, known as the the "Arizona Divisica," and also the division extending westward from Needles. This office was in charge of two chief dispatchers and six assistants—three assistant dispatchers being assigned to each division, each of the assistant dispatchers being on duty and in charge of the work on his division for a period of eight hours in each day. The chief dispatcher exercised a supervisory control over the work of both divisions. Assistant

Dispatcher E. L. Moore was on duty and in charge of the work on the Arizona Division at the time of the collision in question (Transcript, pages 36 (70-1), 41 (78-9). Neither of the stations between Needles and Kingman was a regular stopping place for either of these trains (Tran. pp 25 (47), 94-½ (186), Time Table).

"All of the stations hereinafter mentioned were within the 4th district of the Arizona Division; at 4:22 on the morning of November 20, 1901, Train No. 3, westbound and about two hours late, was at Kingman, and Train No. 4, eastbound and about twenty-two minutes late, was at Needles. Both No. 3 and No. 4 were regular schedule or time card trains, and when on time or but sligthly delayed were run in accordance with the published time card and general rules, and without any special orders. On this occasion, on account of No. 3 being so greatly delayed, it became necessary to issue special orders for the operation of these trains over this division. At 3:21 on that morning, in anticipation that No. 3 would arrive at Kingman from the east greatly delayed, Dispatcher Moore promulgated a special order, No. 17, to govern the running of this train from Kingman to Needles, and this order was through the regular channels sent to Kingman and delivered to the crew of No. 3 upon her arrival at that point. But as this order was entirely superseded by later orders, it is of no moment here. (Trans. pp. 37-8 (72-4)). At 4:12 a. m., it being apparent that No. 3 would arrive at Kingman more delayed than had been expected, Dispatcher Moore promulgated a special order, No. 22 (which entirely superseded Order No. 17), the body of Order No. 22 being in words as follows:

" 'No. 3, eng. 482, has right of track over No. 4,

eng. 444 & 450 to Needles but will run 1 (one) hour & 50 mins. late Kingman to Needles.'

"Copies of this order properly and regularly addressed were through the regular channels sent to Kingman and Needles and delivered in accordance with the general rules to the crew of No. 4 before 4:22 and to the crew of No. 3 upon her arrival at Kingman at 4:21 or 22. (Trans. pp. 21-2 (40-1), 38-9 (74-5). At 4:22 No. 4 departed from Needles and ran east to Mellen, the first telegraph station, a distance of 11.9 miles, arriving there some time between 4:42 and 4:45, and stopped upon signal that there were orders to be delivered. (Trans. pp. 22 (42), 58 (115), Map of Line, Kingman to Needles).

"At 4:21, it being apparent that No. 3 was more delayed in arriving at Kingman than had been expected when Order No. 22 was issued, Dispatcher Moore promulgated a special order, No. 23 (which superseded Orders No. 17 and No. 22 except the provision in Order No. 22 that No. 3 should have the right of track over No. 4 from Kingman to Needles). The body of Order No. 23 was in words as follows:

" 'No. 3 eng. 482 will run two hours late Kingman to Needles.' (Trans. pp. 20 (39), 21 (40), 39 (75), 40 (76).

"Copies of Order No. 23 properly and regularly addressed were through the regular channels sent to Kingman and delivered in accordance with the general rules, and at the same time that Order No. 22 was delivered to the crew of No. 3 at Kingman; No. 4 having departed from Needles about time Order No. 23 was promulgated, copies of this order were sent through the regular channels to the local telegraph operator at Mellen for delivery to No. 4 upon its arrival there, and were delivered

in accordance with the general rules to the crew of No. 3 at Mellen at 4:45. These orders, considered in connection with the time card and general rules, amounted to a direction and notice that No. 3 was to be run in accordance with the time card and general rules except in this only, that it was to run two hours behind its time card time, and that for this occasion the westbound train was to have the right of track over the eastbound train (Trans. pp. 23 (43-4), 25-6 (48-9)); and in like manner amounted to a notice and direction to No. 4 to proceed toward Kingman looking out for No. 3 and running with reference to the schedule of No. 3 as provided for by the special orders in connection with the time table. These special orders, in connection with the published time table or schedule, all of which were well known and understood by each of the crews in charge of these trains, fixed and made known to each of these crews the time that No. 3 should depart from each of the stations between Kingman and Needles. (Trans. pp. 23 (44), 94-½ (186), Time Table). The testimony of numerous witnesses shows, and there is no conflict on this point, that the special orders above mentioned were proper and sufficient orders for the safe operation of these trains between Needles and Kingman, and that like orders are commonly used under similar circumstances on practically all railroads in the United States (Trans. pp. 24-5 (46-9), 31 (60-1), 40 (76), 46 (89), 47 (90), 48 (93), 53 (104). Each conductor and engineer had in his possession a copy of the oders and also copies of the time table and general rules, and fully understood the meaning and effect of the orders considered in connection with the time table and general rules. These documents fixed Franconia as the probbale place of

passing of these trains. The crew of No. 4 when they left Mellen understood that No. 3 had the right of track and they departed from Mellen with the intention of running to Franconia and there going upon the siding so as to avoid No. 3 (Trans. pp. 23 (44-5). The plan of operation of these trains under the orders in question, in respect to avoiding collision and selecting a point of passing, differed in no way from the plan of operation of trains of like class provided for by the time table and general rules in cases where the train having the inferior right of track was behind time; in such cases the train having the superior right of track, while keeping within its time, could proceed without reference to the opposing train, but the last named train was bound to look out for and avoid the train having the superior right of track.

"Train No. 3 departed from Kingman at 4:31, or in other words, six minutes late according to its schedule as provided by Special Order No. 23 and the time card. Yucca was the only night telegraph office between Kingman and Franconia, and is located 23.9 miles west of Kingman and 12.8 miles east of Franconia (Trans. p. 58-½ (115), Map). No. 3, according to Special Order No. 23 and the time card, should have passed Yucca at 4:57 (Trans. p. 94-½ (186), Time Table). Defendant in error attempted to show and the trial court found that she passed at 4:55, or two minutes ahead of her schedule time. At about 4:58 or 59 the local telegraph operator at Yucca, in accordance with the rule requiring that each local telegraph operator immediately report to the train dispatcher the time that each train passes his station, reported by telegraph to Dispatcher Moore that No. 3 passed at 4:55 (Trans. pp. 26 (50-2), 29-31 (57-61). Plaintiff in error attempted

to show that No. 3 passed Yucca on time and that the report of the local telegraph operator that she passed at 4:55 was due to an error of two minutes in the time shown by his clock, but the trial court found against plaintiff in error on this point. Train No. 4 left Mellen, the only night telegraph office between Needles and Franconia, between 4:45 and 4:47 and ran 6.8 miles to a siding or station called Powell, arriving at about 5 o'clock, and a stop of three or four minutes was there made for the purpose of adjusting the flow of fuel oil on one of her locomotives (Trans. pp. 23 (44-5), 25 (47-8). No. 4 then proceeded toward Franconia, and while running between forty and fifty miles per hour collided with No. 3, which was running between sixty and seventy miles per hour, at 5:12 or 13, and at a point about one mile west of Franconia. No. 3 had passed Franconia station at 5:11, or six minutes ahead of the time fixed by Special Order No. 23 and the time table (Trans. p. 32 (63).

"But for the collision No. 4 would probably have had time to reach Franconia and to have gone upon the siding there before 5:17, the time fixed for No. 3 to pass Franconia. Both these trains were wrecked, a number of persons killed, and several others, including plaintiff, sustained serious injuries in this collision.

"Defendant in error alleged that the collision and his injuries were caused 'solely by reason of negligence and want of care on the part of defendant.' Trans. pp. 4 (6-8). Plaintiff in error denied this allegation and affirmatively alleged: First, that the collision and defendant in error's injuries were caused by his contributory negligence; and, second, that the collision and defendant in error's injuries were caused by his negli-

gence and carelessness and the negligence and carelessness of his fellow-servants and co-employes (Trans. pp. 10-11 (19-21)."

The assignments of error presented for consideration but three questions:

First: As to the jurisdiction of the trial court.

Second: Are the findings of fact sufficient to support the conclusions of law and the judgment?

Third: Is there any evidence to support the findings of fact?

These questions will be considered in the inverse order named.

IS THERE ANY EVIDENCE TO SUPPORT THE FINDINGS OF FACT?

Assignment No. 7 (Record p. 118) notices the latter part of finding 3, wherein it was found that the accident and collision in question in this case "was caused wholly by negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of a fellow servant, or fellow servants, that negligence of each said defendant through its train dispatcher, and fellow servant, or fellow servants, approximately contributing to the aforesaid collision, injuries and damage." (Record p. 14).

Finding IV. is as follows:

"That defendant's train dispatcher, when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care care and precaution to prevent said engines and trains from colliding; and in failing to use ordinary care nad prudence by not giving proper orders as to the movement of one of said engines and train." (Record p. 14).

The statement of facts gives in detail the facts concerning the handling of the two trains over the track covered by the train dispatcher's sheet to the place of collision, and we may assume that this narration of facts is as favorable to plaintiff in error as the record will warrant, yet it discloses a series of facts in evidence upon which a trial court could properly deduce all the findings of fact found by the trial court in this case, but in the record there is more and stronger evidence in support of the findings of negligence on the part of plaintiff in error than is set out in such statement of facts.

The case was tried by the court sitting without a jury (Stipulation, Record, bottom p. 12).

Under the provisions of Sec. 649 and 700 U. S. R. S. such finding of fact is conclusive upon this writ of error if there was any evidence upon which such finding could be made.

In the case of Dooley vs. Pease, 180 U. S. 126, the rule is stated thus:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Stanley vs. Albany Co. Supers. 121 U. S. 547.

"Errors alleged in the findings of the court are not subject to revision of the circuit court of appeals or by this court, if there was *any evidence* upon which such finding could be made."

Hathaway vs. First Nat. Bank, 134 U. S. 498.
St. Louis vs. Rutz, 138 U. S. 241.

The negligence of plaintiff in error arose out of the failure of Train Dispatcher Moore to avail himself of knowledge of facts brought to his notice in the line of his duty that a collision between trains 3 and 4 was imminent and that he did not give such orders which he well could have done as to the management and running of said trains, by which such collision would have been prevented.

His Honor, Judge Wellborn, in his conclusions (Record p. 18 (34), stated the facts showing such negligence as follows:

"Second—Train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and, in failing to so act, was negligent.

"Without undertaking to review the evidence, it may be well to observe here, that in my opinion, the statement of Moore to the operator at Yucca, that the latter's clock was two minutes slow, and placing the figure 7 over the figure 5 on the train sheet, was subsequent to the collision, and but clumsy shifts of Moore, under great mental perturbation, to obliterate what seemed to him and in fact were unmistakable traces of the fatal negligence of which he was consciously guilty.

"Third—Said negligence of the train dispatcher, together with that of the conductor and engineer of train number 3 in running said train ahead of its time, caused said collision, and, therefore defendant is responsible for plaintiff's injuries.

"While there is some conflict of opinion among the witnesses as to the time necessary to start a

train, such as No. 4, from Powell, and clear an opposing train at Franconia, it appears, if not incontestibly, certainly by a decided preponderance of evidence that the collision occurred one mile west from the west switch of the Franconia siding, and five minutes before train number 3 was due at Franconia station, 1250 east of said switch, and, that plaintiff, but for said collision, could have reached and placed his train, number 4, on said siding within two or three minutes thereafter, and this would have been two or three minutes before number 3 was due at said station, while defendant's rule No. 385 only requires the train not having right of track to take siding and be clear of main track before leaving time of opposing train."

The train sheet made up by Train Dispatcher Moore as these two colliding trains approached each other, station by station, upon which sheet was kept or should have been kept, a record of the progress by hour and minute, is a writing which plaintiff in error made at the time as each act was done and as each fact occurred. It is the one piece of documentary evidence in the case, which records the events as they happened, and shows upon its face in most unmistakable terms that plaintiff in error had notice just after train number 3 had passed Yucca station that train number 3 was running ahead of its time by two minutes as it passed that station.

This train sheet is to be found copied into the record at page 98-½ (195). The original should be lodged with the clerk of this court for inspection.

The effect of the knowledge of the train dispatcher is shown by the train sheet that train number 3 passed Yucca station at 4:55 a. m., and

so ahead of its schedule time, was to apprise the plaintiff in error that such train was violating its rule 392, provided for the safety of its trains, requiring that "a train must not arrive at a station in advance of its schedule arriving time, when shown."

"A train must not leave a station in advance of its schedule leaving time."

Rule 392 (Record p. 82 (162).

Having this knowledge that train number 3 was running in advance of its schedule time, on a down grade, where more time could be gained by its attaining greater speed, the train dispatcher was thereby placed on notice that either the train crew was wilfully violating rules and orders, or that the train was from some cause uncontrolable, or that the engineer's watch was stopped or running slow, and under the circumstances it was but the exercise of common sense and common prudence for the train dispatcher to make an order to the operator at the next station, Franconia, to stop number 3, as it was evident to him, or should have been from the orders in force to number 4, that that train had not yet but soon would arrive at Franconia, and that unless number 3 were stopped at that point, there would be a collision.

That train dispatcher had from 4:58 or 4:59 to 5:11 within which to make this order and stop number 3 at Franconia.

No such order was given, and number 3 passed Franconia at 5:11 a. m., running by at 45 to 50 miles per hour, and within two minutes thereafter, running at a speed of 60 to 70 miles an hour, came in collision with number 4, going at a speed of 45 miles per hour, the combined momentum of

the two objects being at the rate of 105 to 115 miles per hour.

The deposition of Dispatcher Moore was taken on interrogatories (Record 27 (51-52), 29-30 (57-60). Its importance suggests its reproduction here:

"My name is Edward L. Moore. On November 20th, 1901, my occupation was train dispatcher. On the morning of that day I was working as train dispatcher at Needles, California, for the Santa Fe Pacific Railroad Company."

"Q. Did the operator at Yucca, Arizona, telegraph you anything as to the passage of train number 3 through Yucca on that morning?

"A. Yes, he did.

"Q. What was it that he telegraphed you, and at what time did you receive the telegram or telegrams?

"A. I received the message at about 4:58 a. m., that train No. 3 had passed there at 4:55 a. m. This is my recollection in the matter.

"Q. Did you or did you not make the figure 4:55 opposite the word Yucca on the train sheet you were using that morning?

"A. I did.

"Q. If you did not, state who did if you know.

"A. I did it myself.

"Q. At what time were the figures 4:55 placed opposite the word Yucca written on that train sheet, and why?

"A. They were placed there about 4:58 or 4:59 a. m. on November 20th, 1901, and I placed them there because the operator at Yucca reported the train by there at 4:55.

"Q. State whether or not you ever wrote the figure '7' opposite the word Yucca on the train sheet.

"A. I did write it.

"Q. Do you know who did?

"A. I did it myself.

Repeated in answer to interrogatory No. 12.

"Q. Do you know when the figure '7' was placed in the column devoted train number 3 on the train sheet of defendant on the morning of November 20th, 1901?

"A. As near as I can remember it was between 4:58 and 4:59 on that morning.

"Q. State when it was.

"A. I have answered this in preceding answer, and will say that so far as I can remember it was *a few seconds after the accident occurred.*

"Q. State circumstantially and in detail all you know regarding the writing of the figures 4:55 and 4:57 in the column devoted to train number 3, opposite the word Yucca on that train sheet of defendant company on November 20th, 1901.

"A. I have stated that I placed those figures there myself, and I wrote them. I wrote the 4:55 just before the accident, and I placed a 7 over the second five just after."

(The witness here also testified that the system of dispatching on the road was that used on all best roads.)

"Q. Why does the said train sheet fail to show the time that train number 3 passed through Franconia on that morning?

"A. During the conversation which I had with the operator at Franconia the collision occurred, and on account of the excitement I failed to place the time on the sheet." (Record p. 31 (60.)

This is all the testimony of Moore touching the facts herein involved.

It is observable that Moore does not in any way excuse the writing of the figure 7 over the figure 5

and especially that he does not say that it was so done because any clock was two minutes slow.

Although he was cross examined on behalf of plaintiff inerror, he was not asked under oath as to the fact of the clock at Yucca being slow, notwithstanding two company employees "said" they had heard him "say" so.

It is not considered necessary that the evidence should be pointed out which shows the functions of the train dispatcher, and his train sheet, nor their importance, as those matters have become common knowledge, and that the train sheet is the instrument, and the only instrument, used by the train dispatcher on duty to keep track of the whereabouts of each and every train on his division, that he could not handle the trains without such an instrument, that the train dispatcher has absolute control of all trains on his division during all the time they are thereon, his duty being to receive from each station operator the notice of the leaving of each train as it passes and to at once record this on the train sheet, at the same time look over said train sheet, see the whereabouts of slower or opposing trains and issue such orders as will prevent head-on or tail-end collisions. The record is replete with evidence as to the duties and functions of train dispatchers.

See testimony of Laurete Holmes, Record p. 36 (70).

See testimony of John Denair, Record p. 28 (53-4).

See testimony of J. E. Butler, Record p. 41-47 (78-91).

We call attention to the fact that on this train sheet the train dispatcher has marked 5:45 and

5:47 against the word "Mellen" instead of the figures 4:45 and 4:47 (Record 98-½ (195), the actual time of arrival and departure of train number 4 from said station. This fact of negligence could easily have caused him to fail in giving the operator at Franconia the necessary order—as when he was notified that train number 3 passed Yucca two minutes ahead of time and then consulted his train sheet it showed that there was nothing in the way of train number 3 instead of showing the exact situation.

The important and fatal omission of the train dispatcher just prior to the collision is apparent from perusal of rule 471 (Record p. 88 (173):

"Meeting orders must not be sent for delivery for trains at the meeting points if it can be avoided. When it cannot be avoided special precautions must be taken by the train dispatcher and operators to insure safety. There should be, if possible, at least one telegraph office between those at which opposing trains receive meeting orders."

For forms of such orders see Record p. 89 (176).

The making of a special order fixing a meeting point for trains 3 and 4 was called for by existing circumstances.

Both trains being behind their regular schedule time, one by two hours, and the other by twenty minutes, and their schedule meeting point being annulled, the distance between the two trains being up grade for number 4 and down grade for number 3, thus rendering their speed unknown, the fact that there was no telegraph station between Mellen and Franconia, at which stations only orders could reach number 4, and the fact that after leaving Kingman, number 3 could only be reached by telegraphic orders at Yucca and Franconia. (See Time Table, Record 94-½ (186).

While this situation at the starting of the two trains called for the making of a meeting point for them by order, and it was negligence under the circumstances not to make one, yet, when for some cause number 3 left Yucca station ahead of time and the dispatcher was notified of the fact, the duty to then issue an order to train number 3 to meet number 4 at Franconia became apparent, urgent and imperative.

There appears to have been something, not shown of record, by which Engineer Williams understood that while he was running ahead of time and had the right of way and no notice of a meeting station, he should continue, possibly, and make up as much time as possible unless he received orders to the contrary from the train dispatcher, who was, or should have been, conversant, as this engineer was not, with the whereabouts of the other train and the rate of speed being made by it.

Even under the rule last quoted it appeared not to have been given to the engineer of number 3 to know anything about the point of meeting of train number 4 or the certain effect of passing Franconia station a few minutes ahead of new schedule time.

Otherwise it would have been impossible for the catastrophe to have happened. This view is supported by the record.

When Engineer Williams, on engine pulling number 3 approached Franconia six minutes ahead of his special order time for leaving that station, he whistled his signal to inquire if there were any orders for his train at that station, and received the truthful reply, "no orders from train dispatcher" by semaphore signal from the operator, and pulled away on his right of track given by special order, doubtless in fancied safety, re-

lying upon the train dispatcher to keep moving trains off the main line ahead, and attaining a speed of a mile or more a minute, came, within 1¼ miles, in collision with number 4, and "both trains were wrecked, a number of persons killed, and several others, including plaintiff, sustained serious injuries." (Quotation, from brief of plaintiff in error, Circuit Court of Appeals, p. 6, Statement of facts ante p 7).

Operator Smith of Franconia says:

"I did not have any orders for number 3 or number 4 that morning."

Record, p. 36 (64).

The conclusion is irresistible that engineer Williams, notwithstanding his testimony, must have been aware of what he was doing—endeavoring to run ahead of the schedule time for the purpose of making up lost time, that he had the right of way in the absence of receiving a signal or orders to the contrary, and having received no notice whatever of a meeting station, he must have been under the impression that his acts were receiving the approval of the train dispatcher, whose duty and ability it was to have accurate knowledge of the movement of the trains number 3 and 4 and to select a meeting station for them. Yet Engineer Williams testified that he was running on special schedule and was not ahead of time, but the accident that happened at least a mile west of Franconia, disclosed that he had what might be termed an "excess" or "rebate" of time of five or six minutes.

Even the operator at Franconia does not appear to have had any knowledge that Franconia was the meeting point. The printed rules and

regulations appeared to have been wholly suspended and everything appears to have been entrusted to the train dispatcher to an extent justifying a belief that the printed rules and regulations, under the existing circumstances, shown in this case, are not so generally relied upon by the company to avoid accidents as to avoid its liability from accidents.

Under these circumstances, the learned and conservative court of appeals, referring to the question as to whether the evidence sustained the findings of fact of the trial court, held, "we cannot say on examining the evidence in the bill of exceptions that there was no evidence of negligence on the part of th plaintiff in error."

Further than this the appellate court would not consider the evidence.

Abbotsford, 98 U. S. 440-443.
Jennings vs. Leonard, 21 Wall. 302.
Raimond vs. Terrebonne Parish, 132 U. S. 192.

II.

DO THE FINDINGS OF FACT SUSTAIN THE JUDGMENT?

WAS IT ERROR TO HOLD THE PLAINTIFF IN EROOR ACCOUNTABLE FOR THE NEGLIGENCE OF ITS TRAIN DISPATCHER?

See opinion Circuit Court of Appeals, Record p. 114, citing

Northern Pac. Ry. Co. vs. Dixon, 194 U. S. 338.

Oregon Short Line vs. Frost, 21 C. C. A. (74 Fed. R. 965).

In Northern Pac. Ry. Co. vs. Mix, 57 C. C. A., 592, the Circuit Court of Appeals approved the instructions as follows, given by the trial court:

"It is the duty of defendant company to all opperators on its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction and to give such orders as will insure the safe passage of the one by the other. With regard to the movement of trains, the train dispatcher stands in the place of the defendant."

DUTY OF THE MASTER

must be commensurate with the character of the service required and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case."

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Hanley vs. Cal., etc., Cal. 240.

"The diligence required will be the greater as the danger in hazards increase."

Darrigan vs. N. Y. E. R. Co., 2 Neg. cases, 264. 52 Conn. 285.
52 Am. Rep. 596.

"The greater the danger to be apprehended, the greater should be the care exercised."

Northern Pac. Co. vs. Mix, 121 Fed. 481.
Mercantile Trust Co. vs. Pittsburg & W. Ry. Co., 115 Fed. 481.

"To make such provisions for the employees as will reasonably protect them against the dangers incident to their employment."

Daves vs. Southern Pac. Co., 98 Cal. 24.
Elledge vs. Ry. Co., 100 Cal. 290.
Nixon vs. Selby Smelting Co., 102 Cal. 464.
See Union Pac. Ry. Co. vs. Jaroi, 53 Fed. 67.
Hanley vs. Cal., etc., Co., 127 Cal. 240.
2 Am. Neg. cases, 264.

CONCURRENT NEGLIGENCE.

Grand Trunk Ry. vs. Oliver P. Cummings, 106 U. S., 700.

The court, by Chief Justice Waite, said:

"At the close of the case on both sides, the court gave to the jury sundry instructions not excepted to, and then at the request of Cummings instructed them further, 'that if Noyes (the person claimed to be a co-servant) was negligent, and if the company was also wanting in ordinary care and prudence in discharging their duties, and such want of ordinary care contributed to produce the injury and the plaintiff did not know of such want of ordinary care and prudence, the defendant would be liable; that if two of those causes contributed, the company would be liable; that the mere negligence of Noyes, of itself, does not exonerate them if one of their own faults contributes.' In the instruction which was given we find no error. It was in effect that if the negligence of the com-

pany contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty or wrong."

See New Jersey & N. Y. R. Co. vs. Young, 49 Fed. 725.
Northern Pac. R. Co. vs. Poirer, 67 Fed. 885.
Crew vs. St. Louis K. & N. W. Ry. Co., 20 Fed. 92.

III.

HAD THE TRIAL COURT JURISDICTION?

The claim of plaintiff in error is not that the action was not properly brought but that the allegation in the complaint is technically defective. There is no pretense or claim that plaintiff in error is not a corporation created by and exercising powers not only as alleged in the complaint, but also and as fully and in all respects as plaintiff in error claims the complaint should have alleged. In other words, the assigned error is in effect, that the complaint does not set forth the corporate powers and its creation as fully and completely as might have been done, or in the language suggested by the plaintiff in error. (Record p. 4, subdivision II. Complaint).

See Opinion Circuit Court of Appeals (Record, p. 115).

The averment is admitted by plaintiff in error to be true by a failure to deny the same in its answer.

See Answer, Record, p. 11 (20).

In addition to this averment and admission, the fact that plaintiff is a federal corporation is made manifest by three several acts of Congress, out of which plaintiff in error derives its existence.

On July 27, 1866, an Act of Congress was passed, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast," under which act of Congress the Atlantic and Pacific R. R. Co. was incorporated.

U. S. Stat. at L. Vol. 14, p. 292.

On March 3, 1897, an Act of Congress was passed (See Stat. at L., Vol. 29, p. 622), entitled "An Act to Define the Rights of Purchasers under Mortgages Authorized by an Act of Congress, April 20, 1871, Concerning the Atlantic and Pacific R. R. Co.," under the provisions of which the purchasers at any such sale or sales and their associates and assigns shall constitute a new company, which shall have and shall be entitled to hold and possess the franchises on said property and to exercise the same rights, powers, privileges, grants and franchises, including the franchise to be a corporation granted by the Act of Congress, approved July 27, 1866, incorporating the Atlantic & Pacific R. R. Co., and under and by virtue of this Act, the Santa Fe Pacific Railroad

Co., being the purchaser at such sale, was incorporated.

Such formation of the corporation of plaintiff in error, Santa Fe Pacific Railroad Co., was thereafter and by Act of Congress, June 27, 1902 (Stat. at L., Vol. 32, p. 405), recognized by Congress in its authorizing said company to again transfer its assets to the Atchison, Topeka & Santa Fe Company.

Bythese acts of Congress and by them alone was created the corporation, the Santa Fe Pacific Railroad Company, plaintiff in error herein.

With respect to this question of jurisdiction, the decisions of the Supreme Court of the United States have for nearly a century uniformly been to the effect of sustaining the jurisdiction of the Federal Courts in such cases as this.

In Union Pac. R. R. Co. vs. Myers, 115 U. S. 1-25.
Osborn vs. Bank of U. S., 9 Wheat. 817-828.
See "Pacific Railroad Removal Cases," 115 U. S. 1-3.

Later, in the case of Texas Pac. R. Co. vs. Cody (166 U. S., 608-611), the Supreme Court of the United States again reiterates the same doctrine, and in doing so distinguished the case of Oregon S. L. & U. N. R. Co. vs. Skottowe (162 U. S., 490), relied upon by plaintiff in error in the case at bar in the lower court:

"By the Acts of Congress of 1887 and 1888 the jurisdiction of the circuit court on removal by defendant (and defendants alone can remove) is limited to such suits *as might have been originally brought in that court;* and it is essential if the jurisdiction is invoked on the ground that the

cause of action arises under the Constitution, laws or treaties of the United States that this should be asserted. If recovery directly depends upon a right claimed under the Constitution, laws or treaties, plaintiff's statement of his case must necessarily disclose the fact, and if the action is brought in that state court, defendant can remove it. If, however, plaintiff asserts no such right, and defendant put his defense on the possession of such right, or its denial to plaintiff, though essential to his recovery, then defendant is remitted to his writ of error from this court to the state to test the Federal questions thus raised.

"It is obvious that in the instance of diverse citizenship a different question is presented. Plaintiff may run his own risk in respect of the cause of action on which he proceeds, but he cannot cut off defendant's constitutional right as a citizen of a different state than the plaintiff to choose a federal forum, by omitting to aver, or mistakenly or falsely stating, the citizenship of the parties.

"And this must be also as to Federal railroad corporations. It was held in Union P. R. Co. vs. Myers ('Pacific R. Removal Cases'), 115 U. S. 1, that as all the faculties and capacities possessed by such corporations were derived from their acts of incorporation by Congress, all their doings arose out of those laws, and, therefore, suits by and against them were 'suits arising under the laws of the United States.' Conceding this, the principle applicable to diverse citizenship may reasonably be applied to them.

(610) "*If in this case plaintiff had simply described defendant by its name, without more, there would seem to be no question that, as the corporation was judicially known to be a federal corpor-*

ation (Italics ours), defendant would be entitled to remove the case on proper allegations in its petition; and we think this necessarily follows, where, by some mistake, or otherwise, the defendant is erroneously stated to be created under state laws. Here defendant was described as 'a private corporation, created and existing under the laws of the state of Texas,' and this was repeated in an amended petition, filed in the circuit court; but no motion to remand was made, nor was the propriety of the removal questioned in any way. Possibly the pleader did not intend to deny the Federal character of the company, but whether so or not, no issue was or could be made as to the source of its corporate existence.

"Oregon S. L. & U. N. R. Co. vs. Skottowe, 162 U. S., 490, is in harmony with these views. That was an action brought in a court of that state of Oregon, to recover for personal injuries alleged to have been caused, in Oregon, by the negligence of the defendant company. A petition for removal was filed and denied, and this denial was approved by the Supreme Court of Oregon. Defendant was described in the complaint as 'a corporation duly organized, existing and doing business in the state of Oregon.' In the removal petition the defendant was alleged to be a consolidated company, composed of several railway corporations severally organized and created under the laws of the territories of Utah and Wyoming and of the state of Nevada, and under an act of Congress, approved August 2, 1882 (22 Stat. at L. 185, chap. 372), entitled 'An Act Creating the Oregon Short Line Railway Company, a corporation in the territories of Utah, Idaho and Wyoming, and for Other Purposes'; and an act of Congress, approved June 20, 1878 (20 Stat. at L. 241, chap. 352), making the

Utah and Northern Railway Company a railway corporation in the territories of Utah, Idaho and Montana.

"This court held that, so far as appeared, *the defendant company existed and was doing business in the state of Oregon solely under the authority of that state*, whether express or permissive; that the acts of Congress referred (611) to did not disclose any intention on the part of Congress to confer or right to be exercised outside of the territories named therein, and that the Supreme Court of Oregon committed no error in affirming the action of the trial court denying the petition for removal.' * * *

"We are of the opinion that the circuit court properly entertained jurisdiction."

In this case it affirmatively appears that plaintiff in error exists and is doing business solely under the authority of acts of Congress, and hence the Skottowe case affords no support to plaintiff in error in its claim of want of jurisdiction, but on the contrary, supports federal jurisdiction in this case.

Regarding assignments of error, defendant fails to find in the record, the holdings, or decisions, by the court, set forth and specified by plaintiff in error's assignments of error, numbers II, III, IV, V, VIII a, and VIII b, IX and X (Record 117, 118 and 119), and contends that such assignments of errors are not in form required by rules 21 and 35 of this court, for the reason that an assignment of error must refer to a particular ruling or decision, and not to a possible reason for a ruling or decision of the lower court. The court can only err by acting, or failing to act.

We have discussed the questions of the sufficiency of evidence to support the findings, the suf-

ficiency of the findings to support the judgment, and the question of jurisdiction, as the only questions presented in the record.

The judgments of the lower courts, respectively, should be in all respects affirmed.

Respectfully submitted,

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